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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 622

COUNTY OF BERGEN, STATE OF NEW JERSEY; COUNTY OF ROCKLAND, STATE OF NEW YORK; THE BOROUGHS OF BERGENFIELD, BOGOTA, DUMONT, HARRINGTON PARK, HAWORTH, NORWOOD AND THE TOWNSHIP OF TEANECK; AND CITIZENS UNITED TRANSIT COMMITTEE, *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellees*.

On Appeal from the United States District Court for the District of New Jersey

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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FOREWORD

This brief is filed in opposition to the motion of The New York Central Railroad Company, hereinafter sometimes called the Railroad, and to the motion of the United States of America and of the Interstate

Commerce Commission, hereinafter sometimes collectively called the Commission, appellees herein, which seek to affirm the final judgment and decree entered on December 4, 1958 by a statutorily constituted United States District Court of three judges, District of New Jersey, from which final judgment and decree this appeal has been taken.

Appellants herein were plaintiff-intervenors below; plaintiffs below, State of New Jersey and Board of Public Utility Commissioners of the State of New Jersey, likewise, have taken an appeal from the aforesaid final judgment and decree (No. 621, this Term). Appropriate motions will be filed as soon as permissible to consolidate these two appeals, together with the appeal of the Railroad in No. 41, October Term, 1958 (No. 838, October Term, 1957) wherein this Court noted probable jurisdiction on June 16, 1958. *New York Central R. Co.* v. *Bd. of Public Utility Com'rs., et al.*, 357 U.S. 917.

Appellants' Statement as to Jurisdiction filed herein sets forth the basis of this Court's jurisdiction to entertain this appeal, the statement of the case and a statement of the questions presented by this appeal. In addition, it refers to the opinion of the District Court which is set forth in full together with the dissenting opinion of Circuit Judge McLaughlin as Appendix A thereto; the "Notice" and "Order" of the Interstate Commerce Commission as Appendices B and C respectively; and applicable provisions of the Interstate Commerce Act, as amended, as Appendix E.

Appellants contend that the questions presented by this appeal are substantial and of particular importance to the public including appellee railroad and

appellants and, accordingly, merit full consideration and determination by this Court upon written briefs and oral argument after which the judgment of the District Court should be reversed and the injunction heretofore issued made permanent.

ARGUMENT

During the closing days of the 85th Congress, Second Session, there was enacted the Transportation Act of 1958, which, although excellent in many respects, does, nevertheless, reflect the haste and disorder which attended its passage. Section 5 thereof (Section 13a, 49 U.S.C.), particularly, is a product of the last minute rush in conference committee and the confusion which characterized the closing days of that Congress. Amidst this disorder, no doubt, could be found railroad representatives anxiously plying their trade but, as was recognized by the dissenting circuit judge of the 3-judge District Court herein, ". . . and one thing is certain, namely, that the public was ignored in the formulation of the amendment 13a(1)." (JS 28a).

Under such tedious circumstances it is not unusual to find legislation wanting in certain constitutional essentials or, at the very least, in need of intelligent and just judicial construction to remove from it the stain of ambiguity and uncertainty. Such, perhaps, is the quality of new Section 13a(1) of the Interstate Commerce Act, 49 U.S.C.A., which the government in its motion (p. 3) concedes gives jurisdiction for the first time to the Interstate Commerce Commission with respect to the quantity of service, discontinuance or change in the operation or service of less than a total line of railroad. The jurisdiction thus delegated by Section 13a(1), by the express terms of the Act, ex-

tends only to the operation or service of any interstate train or ferry *subject to State law or regulation* (JS 36a). Thus, the intent of Congress was not to create regulation where before none had existed. To the contrary, this legislation, Section 13a(1), is addressed only to railroad service operating between those States which have undertaken to regulate the quantum of such service.

By Section 13a(1) the Congress did not undertake to oust from jurisdiction the State and local authorities and thus impose a dominate federal authority. To the contrary, the section clearly recognizes and fosters a continuing local authority which is subject only to temporary suspension and, then, only after the railroad has complied with certain statutory provisions of Section 13a(1) as to the giving of notice. At this point the jurisdiction of the Commission, thus invoked, becomes alive and upon the notice thus filed by the railroad the Commission must determine in the first instance whether public convenience and necessity and undue burden on interstate commerce warrant an investigation into the proposed discontinuance of service.

Such an investigation may stem from the Commission's own initiative; or it may result from one or more complaints filed with the Commission under its general complaint procedure of Section 13 of which Section 13a is but an enlargement. Indeed, Section 13a(1) contains within itself provision for the making of complaints to the Commission. The Commission, in determining whether to institute an investigation into a proposed discontinuance as prayed for in such a complaint, tests the sufficient of the allegations of the complaint. If the complaint contains allegations suffi-

cient to place in doubt the propriety of the proposed discontinuance in light of public convenience and necessity and considerations of interstate commerce, then the Commission must institute an investigation. Its refusal so to do is judicially reviewable, because such a refusal is a final exercise by the Commission of its *quasi judicial* function of determining controversies.

Of course, without an oral hearing with opportunity for cross-examination, the Commission has no way of knowing whether the allegations of complainants are true; nor, indeed, has it any way of knowing whether the allegations of the railroad are true. When the issues are raised, as they were in the instant case, the Commission has no alternative other than to proceed to resolve the issues. The determination thereof by the Commission after investigation and hearing, of course, is judicially reviewable, and to this appellees raise no dispute. Rather does the present dispute relate to the reviewability of an order of the Commission *not* to investigate complaints which on their face contain allegations which, if found to be true, would justify the Commission in denying the Railroad's proposal to discontinue service.

The effect of the Commission's refusal in the instant case to institute an investigation is the same as though the Commission, after investigation, had found the proposed discontinuance justified by considerations of public convenience and necessity and of interstate commerce. The issues raised by appellants before the Commission were determined with the same finality and adjudication. Certainly appellants and others may test the sufficiency of the Commission's decision in such a situation in a court of law as surely as they

might had they suffered an adverse decision after investigation and hearing.

1. Appellees urge that appellants had no right to a hearing or to offer evidence on the question of whether the Commission should institute an investigation. But the Commission may not ignore and reject factual allegations as untrue without affording appellants an opportunity to prove their allegations. In similar fashion, a court of law may not dismiss a complaint which states a valid cause of action.

The Commission by a footnote on page 12 of its motion[1] to affirm readily concedes that in arriving at its decision whether to institute an investigation pursuant to Section 13a(1) it is bound by the same legislative standards, "public convenience and necessity" and "undue burden on interstate commerce" as would control its decision after an investigation. Of course, with this appellants readily agree. But appellants go one step further and assert that just as a decision of the Commission on "public convenience and necessity" and "undue burden on interstate commerce",

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[1] This footnote 3 on page 12 of the Commission's Motion reads as follows:

> "[3] The intervening appellants, but not the appellant State and Board, contend that Section 13a(1) constitutes an invalid delegation of legislative power 'in that no legislative standard is provided to guide the Interstate Commerce Commission in its determination not to hold an investigation' (J. St. (622), 23 ff.). But in determining whether to investigate, the Commission obviously is to be guided by the same standards which govern its decision whether (if it does investigate) to direct restoration or continuance of the service—'public convenience and necessity,' and 'undue burden on interstate commerce,' applied in the light of the National Transportation Policy. Appellants concede (id., 25) that these standards are adequate."

after full investigation, must be based on substantial evidence and those other considerations contemplated by the Administrative Procedures Act, so, too, must its determination of these two ultimate issues, "public convenience and necessity" and "undue burden" meet the same requirements when the Commission is deciding whether or not to investigate.

Appellees further argue that the complaint provisions of Section 13(1) and (2) are not to be construed as part of Section 13a(1). So to argue is to ignore the fact that the provisions of Section 13a(1) were made a part of existing Section 13 for the very purpose of making available to appellants and others the well understood and existing complaint procedures of Section 13.

Section 13(1) and (2) provide for complaints by appellants and others as a means of obtaining satisfaction for anything done or omitted to be done by any common carrier subject to the provisions of the Act in contravention of the provisions thereof. Appellants and others filed such complaints alleging the Railroad to have violated the very section pursuant to which the Railroad purported to act—Section 13a(1).

Section 13a(1) did not repeal the existing provisions of Section 13(1) and (2). On the contrary, it enlarged upon the several grievances for which satisfaction is available.

2. In their motions to affirm appellees argue there exists no substantial issue relative to the constitutionality of Section 13a(1). In this regard, particularly the Commission speaks of the various powers of the Congress and finds them suffiicent to permit the construction it claims for Section 13a(1). But the

case does not involve hypotheticals. Appellants concern is with what the Congress actually has attempted to do through the enactment of Section 13a(1).

Appellants argument on the constitutionality of Section 13a(1) is in the alternative, in the event that it be found to be susceptible to an interpretation and construction falling within constitutional requirement. The majority of the District Court, however, on the argument of appellees, has construed Section 13a(1) in a manner abrogating and deleting the necessary legislative standards from that section. As conceded by the government and the Commission, the standards of "public convenience and necessity" and "undue burden on interstate commerce" must guide the Commission in its determination whether to investigate. At this advanced stage of federal administrative law it is almost trite to say that the determination of these ultimate facts must be based on substantial evidence the absence of which would render the Commission's decision unlawful and subject to injunction.

The effect of the holding of the majority of the District Court is to permit the Commission to base its determination on something other than substantial evidence and to open the door to arbitrary and capricious action, to abuse of discretion and to do all of those things which the Administrative Procedures Act was designed expressly to prevent.

Appellants also allege Section 13a(1), as construed to deprive them of constitutional due process under the 5th Amendment. Appellees while not denying the truth of the allegation, nevertheless, argue that appellants have no standing to raise this charge. But in

this appellees are being unfair. Having obtained a favorable ruling from a majority of the District Court denying appellants offer to prove their standing, appellees ought not now to be permitted to argue that appellants have no legally protected interest sufficient to permit them to invoke the due process clause of the 5th Amendment.

The District Court's denial of appellants offer of proof of their basic property and contractual interest is an issue on this appeal. It is curious to note that appellees have ignored this question in their respective motions to affirm.

At present, there are before the Commission an excess of twenty Section 13a applications similiar to the instant case. The muddle in which the Commission finds itself in construing and applying the powers delegated to it by Section 13a must be resolved before its just and equitable administration is possible. For example, in *Great Northern Ry. Co.—Discontinuance of Service,* I.C.C. Finance Docket No. 20348, decided February 6, 1959, the majority of the Commission apparently adopts the view that it must determine "public convenience and necessity" and "undue burden on interstate commerce" whether it requires continuation of the service or not. This, of course, is the view advanced by appellants herein. But the dissent in that decision advances the view of appellees herein to the effect that "public convenience and necessity" and "undue burden on interstate commerce" need be found only when the service is to be continued. This is the view advanced herein by appellees. The error is clear. The requirements of "public convenience and necessity" and considerations of interstate commerce should

dictate whether the service is to continue or terminate, and not the reverse. To say that these two ultimate findings are to be made only after the decision to discontinue or continue the service has been made is to ignore the very legislative standards which the Congress has laid down to control the Commission's action. Congress did not delegate to the railroad authority to expel local jurisdiction, but rather gave to the railroad an election of agencies, either local or federal, to which it might look for regulation.

3. Perhaps the major issue on this appeal relates to the judicially reviewable character of the order of the Commission wherein, among other things, it declined to investigate the proposed discontinuance.

a. The Commission argues by its motion (page 12-13) that the order of the Commission is not reviewable because it neither ". . . required or prohibited action by any person within the meaning of *United States* v. *Los Angeles & S.L. R.R. Co.*, 273 U.S. 299, 310, or foreshadowed enforcement proceedings as in *Frozen Food Express* v. *United States*, 351 U.S. 40." But to make the argument is to answer it, for, as has been stated already, the Commission's action clearly was an exercise of its *quasi judicial* function of determining the controversy which existed between the railroad and appellants. Even the railroad fully appreciates the severity of the contest on the issue before the Commission (page 10 of Railroad's motion).

To an extent even greater than in *Frozen Foods Express*, supra, the situation here is different from a mere investigation by the Commission such as its investigation in *Railroad Passenger Train Deficit*, I.C.C. Docket No. 31954 (1958) where the Commission under-

took on its own initiative ". . . a fact-finding survey pursuant to the duty of the Commission specified in section 12(1) to 'keep itself informed as to the manner and method in which the same [business of all common carriers subject to the provisions of this part] is conducted.' "

In the instant proceeding the rights and claims of appellants were adjudicated and disposed of finally by the summary action of the Commission.

b. Appellees also urge this Court's holding in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958), as controlling on appellants' right to judicial review pursuant to Section 1009(*e*) of the Administrative Procedures Act, Title 5, U.S.C.A.

Certainly Section 1009 recognizes the power of Congress by law to commit certain areas of agency action to the unreviewable discretion of one of its agencies. But to adopt the argument thus advanced would be tantamount to holding that even after an investigation, the Commission's action would not be reviewable. No one contends this to be consistent with the law. Why is not the Commission's action in the instant case as reviewable as it would be after a hearing is had and evidence introduced? The same rights and interests are adjudicated and concluded on the same allegations. The only difference is that the decision after hearing would be based on substantial evidence, whereas in the instant case it clearly was not.

The principal contention of appellees on this point is that the brief time limitations imposed upon the Commission by Section 13a(1) manifest a Congressional intent to withhold judicial review (Railroad's Motion, p. 10; Commission's motion, p. 8).

That Section 13a(1) was enacted by the Congress to afford railroads some uniformity of regulation and a measure of prompt regulatory action over the quantum of their service is not disputed here by appellants. Certainly, in placing statutory time limitations upon the Commission the Congress mandated prompt action. But to recognize this time limitation as short and perhaps unrealistic in light of the Commission's prior practice, through no stretch of juristic debate denotes an intent by the Congress to abrogate and ignore the rights and demands of the public as recognized by the Congress. Rather do these time limitations, expressed in the statute, prescribe for the Commission an order of business with Section 13a(1) proceedings, perhaps from usual regulatory lag, receiving primary consideration. Appellees would confuse the need for prompt determination as a license for no determination.

To the contrary, the greater there exists the opportunity for rash and reckless action, the greater the need for judicial restraint. The Urgent Deficiencies Act contains provision within itself and the Administrative Procedures Act was expressly enacted to afford that judicial review so needful in the instant case.

The majority of the District Court adopted the argument of the railroad to the effect that Section 13a(1) does not require action by the Commission, and, therefore, there exists no action to be reviewed by the court. In reply appellants submit that in the instant proceeding the Commission, nevertheless, did act and that action is reviewable. But the fallacy of the rational of the majority below in this respect is made more obvious by its suggestion that the proper course

for appellants to have followed is a suit in mandamus. If the Commission had failed to act in the instant proceeding, then mandamus may have been the appropriate remedy. But for the majority of the District Court, on the one hand, to conclude that the Commission did not have to act, and, on the other hand, to conclude the appropriate remedy available to appellants to be mandamus compelling action, merely compounds the contradiction under which the railroad and the court below labor.

In serving notice on the public and filing with the Commission, appellee railroad failed to comply with the requirements of Section 13a(1). In arriving at its determination upon the notice so filed, the Commission, likewise, failed to comply with the statute. And by ignoring the numerous complaints and protests filed with it by appellants and others, the Commission further acted contrary to its statutory authority. These are serious allegations deserving careful presentation and thoughtful judicial determination. They ought not to be disposed of in such summary fashion as appellees now seek by their motions to affirm.

c. The final argument advanced by appellees assumes the action of the Commission to be reviewable under Section 1009, Title 5, U.S.C.A., and proceeds on the theory that the records developed before the Commission in two prior cases support its decision not to investigate the instant complaints (Commission's motion, p. 13).

The first of these two records, *New York Central Ferry Abandonment*, 295 I.C.C. 385, 519, was made almost four years ago and includes none of the very

substantial reduction in ferry service and costs subsequently permitted the Railroad, nor any other alleged very substantial change in circumstance. Affirmative proof was offered by appellants of these facts, but was largely rejected by the majority of the court below. But the principal objection to the use of this record is that, although it addressed itself to the question of public convenience and necessity, one of the two standards controlling the Commission in the instant case, its findings thereon were not supported by substantial evidence when originally made several years ago. The passage of time has not served to correct this error. Indeed, the same 3-judge District Court which ruled in the instant case, previously expressed itself, unanimously, to the effect that the record was wanting in substantial evidence to support the Commission's conclusion. *Board of Public Utility Commissioners, et al.* v. *The New York Central Railroad* (D.C. N.J. 1957) 158 F. Supp. 98. The Railroad has challenged this ruling by its appeal to this Court (No. 41 this Term).

The second record is one developed in support of an application for an increase in fares and charges for the Weehawken ferry and addresses itself to the reasonableness of the proposed rates. Evidence on the question of "public convenience and necessity" and "undue burden on interstate commerce" was not there received and, accordingly, the evidence did not address itself to those considerations. At the conclusion of that proceeding the examiner recommended substantial increases in fares up to 200 per cent, and the present appellants concurred in substantial increases provided the ferries continue to operate. This record was not available to the Commission or consid-

ered by it at the time it refused to act in the present matter. The Commission has since failed to act further in the rate matter. The railroad obviously has encouraged non-action in the hope that the instant case may render that proceeding moot.

To rely upon two such irrelevant and inadequate records to support the instant case while refusing to consider present facts raised on complaint and protest is certainly the type of abusive action which the Administrative Procedures Act was designed to prevent.

CONCLUSION

No attempt has been made here to present a detailed brief and argument on the merits of the case. The Jurisdictional Statement filed herein by appellants states the issues and outlines the arguments. Pending availability of the printed record, little more can be added at this stage of the proceeding. But the serious problems which exist in the construction to be placed upon Section 13a(1) are clear. Until they are resolved, neither the Commission nor the railroads will understand their respective roles under Section 13a(1). As the Commission knows, the impact of this indecision is already making itself felt on the traveling public.

Appellants submit that the issues presented on this appeal are substantial; that they are of general public interest and merit fuller consideration by this Court than is possible at this preliminary stage. Appellees' motions to affirm should be denied; or, in the alterna-

tive, ruling thereon should be deferred until such time as the case is submitted on the merits.

Respectfully submitted,

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